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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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STATE OF DELAWARE,

Plaintiff,

—against—

STATE OF NEW YORK,

Defendant.

ANSWER BY THE STATE OF NEW YORK TO COMPLAINT OF THE STATE OF TEXAS

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April 21, 1989

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ANSWER BY THE STATE OF NEW YORK TO COMPLAINT OF THE STATE OF TEXAS

The State of New York, defendant, by its counsel, for its answer to the complaint of the State of Texas, says:

1. It admits the allegation in paragraph 1 of the complaint that the State of Texas ("Texas") has invoked the original jurisdiction of this Court under article III, section 2 of the Constitution of the United States and section 1251 of title 28 of the United States Code, but denies that this Court has jurisdiction on the ground that the dispute is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. It admits the allegations in paragraph 2 of the complaint, but states that the dispute between Delaware and New York also concerns abandoned property held by New York.

3. It admits the allegations in paragraph 3 of the complaint.

4. It admits the allegations in paragraph 4 of the complaint.

5. It admits the allegations in the first sentence of paragraph 5 to the extent that the litigation at the time Texas filed its motion for leave to file a complaint in intervention involved a dispute concerning which state was entitled to the custodial taking of abandoned property ("abandoned dividends"), and denies the remainder. It denies that the definition of "Excess Receipts" in paragraph 5 is accurate except that it includes "Distributions" received by brokerage firms incorporated in Delaware for the benefit of their customers which exceed the amounts to which the brokerage firms which received the "Distributions" were entitled. It denies the allegations in the last sentence of paragraph 5, except it admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute.

6. It admits that the first two sentences of paragraph 6 accurately describe the relief which Texas is seeking, but denies that "Additional Excess Receipts" involve the same issues as "Excess Receipts." It denies the allegations in the third sentence of paragraph 6, which defines "Additional Excess Receipts" inconsistently with the definition on page 13, except that it admits that The Depository Trust Company ("DTC"), a trust company incorporated in New York, is a national clearinghouse for the settlement of trades in corporate and municipal securities and that DTC currently remits abandoned dividends owed to non-DTC participants to New York. New York also denies the accuracy of the definition on page 13 and states that the failure of Texas throughout the complaint to specify which of the two inconsistent definitions of "Additional Excess Receipts" is meant makes much of the complaint incomprehensible. It states that unclaimed principal and interest payments on municipal and

state bonds which have been made to record owners of the bonds – such as DTC, brokers, or bank personal trust departments – where the creditor has abandoned them should be routinely remitted to Texas pursuant to section 72.101 of its Property Code. In such cases, since the obligation of the issuer to pay the record owner has been satisfied, the unclaimed principal and interest payments are no longer "debt obligations attributable to corporate and Governmental Issuers." On the other hand, principal and interest payments held by paying agents of corporate and governmental issuers which have not been paid to record owners remain "debt obligations attributable to corporate and Governmental Issuers." New York does not take custody of such funds under current law although Texas may do so under section 72.101 of its Property Code and at least 33 other states have coverage which is similar to that of Texas. It denies the allegations in the fourth sentence of paragraph 6.

7. It denies the allegation in paragraph 7 that the abandoned dividends at issue in this case constitute a debt of the issuers of the underlying securities to the beneficial owners, whose claims to dividends and distributions are satisfied in the ordinary course of business by brokers. The remainder of paragraph 7 states legal conclusions to which no response is required, but if a response is required it denies the allegations. It incorporates by reference here its response to paragraph 6.

8. Paragraph 8 for the most part states legal conclusions to which no response is required, but if a response is required, it denies the allegations. It denies the allegation in the second sentence of this paragraph that under existing practice a debt of identical character is remitted to the issuer's state of incorporation when held by the issuer's paying agent. A paying agent of the issuer reports unclaimed dividends which have not been paid to record owners to the state where the issuer (debtor) is incorporated when the address of the unpaid record owner (creditor) cannot be determined from the books and records of the issuer. Unclaimed funds held by record owners – such as DTC or brokers – are of an entirely different character.

9. It admits that paragraph 9 accurately characterizes the relief which Texas is seeking, but it otherwise denies the

allegations in this paragraph. It incorporates by reference here its response to paragraph 6.

10. It admits that Texas is asserting its claim pursuant to chapter 72 of the Texas Property Code, Tex. Prop. Code Ann. § 72.001 *et seq.* (Vernon Supp. 1989) ("Texas Property Code"), but states that the terms of this statute speak for themselves.

11. It admits the allegations in the first sentence of paragraph 11. It denies the allegation in the second sentence that the process by which securities distributions are made is generally understood only by persons within the "Distribution System." It denies that the two charts attached as exhibits "1" and "2" are accurate.

It denies that the definition of "Additional Excess Receipts" is accurate and incorporates by reference here its response to paragraph 6. On information and belief, it denies that "Distributions," as defined by Texas, received by DTC for its participants in transactions between its participants give rise to unclaimed funds which are deemed abandoned and turned over to the Comptroller.

It denies that the definition of "Customer" is accurate and states that "customer" is defined in section 510(6)(a) of the New York Abandoned Property Law, but admits that the definition of "Beneficial Owner" is accurate, but only if qualified in the context of this case to indicate that these economic rights to distributions are routinely satisfied by brokers on the record date and, therefore, the Beneficial Owner has no economic right against the issuer.

It admits that the definition of "Book Entry Accounting" is accurate.

It admits that the definition of "Book Entry Certificate System," to the extent it is limited to DTC, is accurate, except that physical certificates are registered for DTC only in the name of its nominee, Cede & Co., but it otherwise denies the allegations in this paragraph.

It admits that "Cede & Co." is the principal nominee used by DTC.

It admits that the description of DTC in the first two sentences of the definition is accurate but it is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the number of clearing houses operating in the United States. On information and belief, it denies the allegation in the third sentence of the definition of DTC to the extent that it states that DTC provides the system described by making federal wire transfers to banks for accounts of DTC participants. It admits the allegations in the fourth sentence. The last sentence is too vague to permit a response, but if a response is required it denies the allegations in this sentence. It states that brokers actively trade for themselves or their customers; DTC is owned by its members and transfers issues between its members, but does not trade. Brokers are defined in section 510(4) of New York's Abandoned Property Law and banking organizations are defined in section 103(c) of that law.

It admits that the definition, "Distributions," as used in the complaint, means dividends, profits, principal, and interest and securities representing any of the foregoing, but it otherwise denies the allegations in this paragraph.

It admits that the definition, "Distribution System," accurately describes how this term is used in the complaint.

It admits that the definition of "DTC Participant" is accurate and that all of the brokerage firms identified in Delaware's complaint are listed as DTC Participants in the December 31, 1987 DTC Annual Report.

It admits that, as used in the complaint, "Excess Receipts" means "Distributions" received by brokerage firms incorporated in Delaware for the benefit of their "Customers" which exceeds the amounts to which the brokerage firms which received the "Distributions" were entitled. It admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute. It denies the remainder of the allegations in this definition.

It denies that the description of "Ex Dividend Date" or "Ex Date" is accurate and states that the explanations in New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* 133-35 and Committee on Stockbrokerage Auditing, American Institute of Certified Public Accountants, *Audits of Brokers and Dealers in Securities* 198-99 (1973) are recognized in the industry. New York lodged copies of these publications with the Court.

It admits that the definition of "Governmental Issuer" accurately describes how this term is used in the complaint.

It admits that "Intermediary" accurately describes how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Issuer" is accurate.

It admits that the definition of "Nominee" is generally accurate, but is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation that the usual form of a "Nominee" is a general partnership.

It admits that the first sentence of the description of "Paying Agent" is accurate. It denies that the second sentence of the description of "Paying Agent" is accurate. The third sentence of the description of "Paying Agent" states a legal conclusion to which no response is required. It admits the allegations in the remainder of this paragraph.

It admits that the definition of "Physical Certificate" is substantially accurate.

It admits that the description of "Physical Certificate System" accurately reflects how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Record Date" is accurate.

It admits that the definition of "Record Owner" is accurate, except that a "Beneficial Owner" is not a "Record Owner" and a "Customer" rarely is a "Record Owner."

12. Paragraph 12 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph.

13. It admits the allegations in paragraph 13.

14. It admits the allegations in paragraph 14.

15. It admits the allegations in paragraph 15.

16. It admits the allegations in paragraph 16, except that it denies that interest is paid in all cases by check mailed to the record owner by the issuer's paying agent, although this is true in most cases.

17. It admits the allegations in paragraph 17.

18. It admits the allegations in paragraph 18, except that it denies, on information and belief, the allegations in the fourth sentence of this paragraph to the extent that they state that DTC participants deal with each other by re-registering all physical certificates in the name of Cede & Co. and by depositing all these physical certificates at DTC.

19. It admits the allegations in paragraph 19, but is without knowledge or information sufficient to form a belief as to the truthfulness of the percentage of new issues in which physical certificates are available to customers.

20. It admits the allegations in the first sentence of paragraph 20, but the remainder of the paragraph states legal conclusions to which no response is required, but if a response is required it denies the allegations in the remainder of the paragraph. The pleadings and briefs of Delaware and New York speak for themselves.

21. Paragraph 21 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The complaint and motion for leave to file a complaint of Delaware speak for themselves.

22. Paragraph 22 states legal conclusions to which no response is required, but if a response is required New York's position is that the abandoned property which Delaware claims consists mainly of dividend and interest overpayments owed by one broker ("debtor broker") to another broker or bank ("creditor broker"). They are not owed to the customers (beneficial owners) of creditor brokers because the customers have been fully satisfied by creditor brokers and, therefore, have no right to claim these overpayments. The majority of these creditor brokers have trading addresses in New York. The answer and brief in opposition to the motion for leave of New York speak for themselves.

23. Paragraph 23 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The pleadings and briefs of the parties speak for themselves.

24. Paragraph 24 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. This Court's decisions speak for themselves.

25. It admits the allegations in the first sentence of paragraph 25 of the complaint. The second sentence does not require a response, but if a response is required it denies the allegations in that sentence.

26. On information and belief, it denies the allegations in paragraph 26 except, on information and belief, it admits that generally trades of physical certificates between DTC participants occur on the books and records of DTC.

27. On information and belief, it admits the allegations in the first sentence of paragraph 27, except it denies that there are no circumstances in which DTC might have legal ownership rights in the physical certificates. It denies the allegations in the second sentence of paragraph 27.

28. It admits the allegations in the first sentence of paragraph 28 except it states on information and belief that purchases of securities held at DTC are also made through firms other than brokerage firms who are, or act through, DTC

participants. It denies on information and belief the allegations in the second sentence to the extent that they suggest that all these purchases are made in book entry form only. It denies on information and belief the allegations in the third sentence to the extent that they suggest "customers" may never receive physical certificates from the issuer or from DTC participants. It denies on information and belief the allegations in the fourth sentence of paragraph 28 except that it admits that each "Customer" may maintain account at a DTC participant or other brokerage firm. It denies on information and belief the allegations in the fifth sentence of paragraph 28 except that it admits that, in some cases, the books and records of the DTC participant or other brokerage firm may constitute the only evidence of each "Customer's" legal ownership. It denies on information and belief the allegations in the sixth sentence of paragraph 28 except that it admits that when "Customers" purchase beneficial ownership from a DTC participant or other brokerage firm, it may send its "Customers" transaction statements confirming and setting forth the terms of the purchase. It admits the allegations in the seventh sentence of paragraph 28. The last sentence of paragraph 28 states legal argument to which no response is required, but if a response is required it denies on information and belief the allegations in that sentence.

29. It admits the allegations in the first two sentences of paragraph 29. It denies on information and belief the allegations in the last sentence of paragraph 29.

30. It admits the allegations in the first four sentences of paragraph 30, except it denies on information and belief the allegations in the third sentence to the extent that they state that the books and records of DTC evidence the amount and identity of physical certificates which are held by DTC participants. It denies on information and belief the allegation in the last sentence of that paragraph that there are three sets of "Record Owners" for the same securities.

31. It admits on information and belief the allegations in the first sentence of paragraph 31. It denies on information and belief the allegations in the second sentence of paragraph 31

to the extent that they state that each distribution received by DTC is allocated on "Ex Date." It admits on information and belief the allegations in the third and fourth sentences of paragraph 31. It denies on information and belief the allegations in the fifth sentence of this paragraph. It denies the allegations in the sixth sentence of this paragraph to the extent that they state that customers must wait until their brokers receive distributions in order to be paid.

32. It admits the allegations in paragraph 32, except denies on information and belief the allegations to the extent that they state that there are three sets of books and records which indicate record ownership.

33. It denies the allegations in the first sentence of paragraph 33 to the extent that they suggest that brokers credit their customer accounts after receiving dividends from DTC. It denies the allegations in the remainder of the paragraph.

34. It denies on information and belief that the example in paragraph 34 accurately describes a typical transaction between two DTC participant brokers which gives rise to unclaimed abandoned dividends.

35. It denies on information and belief that the allegations in the first five sentences accurately describe the method of settling transactions between DTC participants. It admits the allegation in the final sentence of paragraph 35.

36. The first sentence of paragraph 36 does not require a response, but if a response is required it denies the allegations in the first sentence. It admits the allegations in remainder of that paragraph.

37. It admits the allegations in the first sentence of paragraph 37 except it denies on information and belief the allegations concerning the method of payment. It admits the allegations in the remainder of paragraph 37, except it denies on information and belief the allegation in the last sentence of that paragrapn that the records of the issuer, DTC, and "DTC Participants" each reflect a different "Record Owner."

38. It denies on information and belief the allegations in the first sentence of paragraph 38. It admits the allegations in the second sentence of that paragraph. It denies the allegations in the last sentence of paragraph 38 except that it admits that in some cases abandoned dividends include physical certificates registered to Cede & Co., but usually such certificates are registered in the name of the broker.

39. It denies the allegations in the first sentence of paragraph 39 except it admits that DTC and DTC participants may function as agents of the "Beneficial Owner." It admits DTC has not claimed any legal ownership interest in the dividend overpayments at issue in this case, but denies that DTC participants have not claimed any interest to abandoned dividends in the custody of the New York State Comptroller. It denies that brokerage firms are neither creditors nor debtors with respect to abandoned dividends in the custody of the Comptroller. The fourth sentence states legal argument to which no legal response is required, but if a response is required it denies the allegations in that sentence.

40. It denies the allegations in paragraph 40.

41. It denies the allegations in the first sentence of paragraph 41 except that it admits that Delaware identified 15 DTC participants. It admits the allegations in the second and third sentences of paragraph 41. It denies the allegations in the fourth sentence of paragraph 41. It admits the allegations in the fifth and sixth sentences accurately describe the claim Texas is making in this case, but denies that Texas is entitled to any of the abandoned property claimed.

42. The first sentence of paragraph 42 states legal argument to which no response is required, but if a response is required it denies the allegations in that sentence. It denies the allegations in the second sentence of that paragraph.

43. It admits the allegations in paragraph 43 accurately describe the claim that Texas is making in this case, but denies that it should be considered by this Court and incorporates by reference here its response to paragraph 6.

44. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the first and second sentences of paragraph 44. The third sentence of that paragraph is too vague to call for a response, but if a response is required it denies the allegations in the third sentence. It incorporates by reference here its response to paragraph 6.

45. It denies the allegations in the first sentence of paragraph 45. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of the paragraph, except that it admits that DTC denied Texas access to its books and records. The allegations in the third and fourth sentences of paragraph 45 are legal argument to which no response is required, but if a response is required it denies the allegations in those sentences. It admits that a copy, with typographical errors, of the November 28, 1988 letter of Patricia Trainor is attached to the complaint, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

46. It denies on information and belief the allegations in the first sentence of paragraph 46 except to the extent that it admits the letter describes the "Cede Float." It admits the allegations in the remainder of the paragraph, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

47. It denies that the quotation in the first sentence of paragraph 47 is accurate and states that the contents of the letter speak for themselves. It admits the allegations in the second sentence of paragraph 47 to the extent that it states that funds in the "Unclaimed Dividends" account do not belong to DTC, but denies on information and belief the remainder of the allegations in that sentence. It admits the allegations in the third sentence of paragraph 47 to the extent that funds remaining in the "Unclaimed Dividends" account after three years that are deemed abandoned are remitted to New York, and denies the remainder, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

48. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the first sentence of paragraph 48 concerning the sufficiency of the information provided by DTC to Texas. It admits the allegations in the second sentence of paragraph 48, except that it denies the amount attributable to Texas issuers is $32,511 and the period covered is correctly stated and states that the correct amount is $32,514 and the period covered is from July 31, 1981 through June 30, 1982. It admits the allegations in the first two sentences of footnote 7 of paragraph 48. It admits the allegations in the third sentence of footnote 7 of paragraph 48 that the Texas Treasury asked New York for a complete copy of an annual unclaimed property report filed by DTC for any one year between 1978 and 1985 and states that on August 8, 1986, New York sent a copy to Texas of sample pages from such a report. It admits the allegations in the fourth sentence of footnote 7 of paragraph 48. It denies the allegations in the fifth sentence of footnote 7 of paragraph 48. It incorporates by reference here its response to paragraph 6.

49. It admits that the allegations in the first sentence of paragraph 49 accurately state the claims Texas is making in the complaint, but otherwise denies the allegations in the first sentence. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of paragraph 49. It incorporates by reference here its response to paragraph 6.

50. It denies on information and belief the allegations in the first two sentences of paragraph 50 and states that DTC is not a paying agent for issuers including any of the issuers listed in the Patricia H. Trainor letter attached as Exhibit 3 to the complaint. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the last sentence of paragraph 50.

51. It denies the allegations in the first four sentences of paragraph 51 and incorporates by reference here its response to paragraph 6. It denies the allegations in the fifth sentence of paragraph 51 except that it admits that it is enforcing the

amendments to section 300 of the New York Abandoned Property Law which became effective April 21, 1987. It incorporates by reference here its response to paragraph 6.

52. It denies the allegations in paragraph 52 and incorporates by reference here its response to paragraph 6.

53. It admits that paragraph 53 accurately states the position of Texas, but it otherwise denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

54. Paragraph 54 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

55. The first three sentences of paragraph 55 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies that inclusion of the claim to "Additional Excess Receipts" will not broaden the issues or unduly complicate the pending litigation. It incorporates by reference here its response to paragraph 6.

56. Paragraph 56 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

57. The first two sentences of paragraph 57 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies the allegations in the third and fourth sentences of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the fifth sentence of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the remainder of paragraph 57 concerning how each office of DTC participant operates or whether each DTC participant has offices in each state, but admits that these allegations describe typical branch or regional offices.

58. Paragraph 58 states legal conclusions to which no response is required except that New York denies on information and belief that DTC functions as a paying agent or registrar and it admits that several states have informally supported the Texas motion to intervene. If any further response is required it denies any other allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

59. Paragraph 59 states legal argument to which no response is required, except that New York denies that persons do not make claims for "Excess Receipts," and if any further response is required, it denies the remaining allegations in that paragraph.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the two states is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. Texas has failed to exhaust administrative remedies.

3. Texas' claims are barred by laches and waiver.

4. Texas has failed to state a claim upon which relief can be granted.

5. Under existing law, Texas is not entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that the addresses of the creditors cannot be determined.

WHEREFORE, this Court should enter judgment dismissing the complaint by the State of Texas.

Dated: New York, New York
April 21, 1989

Respectfully submitted,

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